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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 432

JOHN McGINNESS,

Petitioner,

vs.

CHARLES LUNA, PRESIDENT, BROTHERHOOD OF RAILROAD TRAINMEN, S. VANDER HEI, VICE-PRESIDENT, BROTHERHOOD OF RAILROAD TRAINMEN, AND T. D. SHARKEY, LOUIS SMIRAGLIA, AND W. G. ZIPPMAN, PRESIDENT, SECRETARY AND TREASURER, RESPECTIVELY, OF LOCAL 225, BROTHERHOOD OF RAILROAD TRAINMEN,

Respondents.

REPLY TO RESPONDENTS' ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI.

MARSHALL PATNER,
Attorney for Petitioner.

135 South La Salle Street,
Chicago, Illinois 60603.

THE DUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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REPLY TO RESPONDENTS' ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI.

Petitioner files this brief to correct the respondents' misstatement (R. Br. pp. 4-5) of this Court's appellate jurisdiction under 12 U. S. C. A. 1257, and to clarify respondents' misleading statement (R. Br. pp. 5-6) that union or state procedure provide any more than an illusory remedy for a union member denied the right to run for union office.

1. Under 28 U. S. C. A. 1257, as interpreted in *Local 438 v. Curry*, 1963, 371 U. S. 542, this Court has appellate

jurisdiction on an appeal from a state court decision granting or denying a temporary injunction, even if that appeal is interlocutory so that the merits on the ultimate issue are yet to be decided (p. 548), if the decision is the final determination available in the state court (p. 550), if the state court has decided a question that is to be determined under federal law (p. 549), and where *Montgomery Bldg. & Constr. Trades Council* v. *Ledbetter*, 1952, 344 U. S. 178, was in conflict with this holding (p. 552), it was overruled.

In the present case the order below is final under Illinois procedure. The order denying a temporary injunction was affirmed by the Appellate Court, and when the Illinois Supreme Court refused to exercise its power to grant review under Ch. 110, Sec. 101-32(1)(a), Ill. Rev. Stat. 1963, that order became final for review by this Court.

The Court below declined to apply the provisions of a federal statute. The Landrum-Griffin Act provides for judicial relief in union election cases when internal union procedure gives no actual remedy, or when union appellate steps will take over four months. Petitioner claims that he was duly nominated to run for union office and his name was unlawfully removed from the ballot. Because there was no actual appellate step available within the union, petitioner filed suit and asked to enjoin the election until his right to run for office was determined. This is the relief available under the federal Act, *Harvey* v. *Calhoon*, 2 Cir., 1963, 324 F. 2d 486, cert. granted 376 U. S. 910 (No. 17).[1]

1. The Solicitor General filed a memorandum *amicus curiae*, and took the position that the Act should not apply, contrary to Cox, Internal Affairs of Labor Unions under the Labor Reform Act of 1959, 58 Mich. L. Rev. 819 (1960); Hickey, The Bill of Rights of Union Members, 48 Geo. L. J. 226, 254 (1959); Smith, The Labor-Management Reporting and Disclosure Act of 1959, 46 Va. L. Rev. 195 (1960). In the memorandum the Solicitor suggests that all such cases should be determined by the Secretary of Labor, under Title IV of the Act (memorandum, p. 7). However,

This Court has appellate jurisdiction under 28 U. S. C. A. 1257 of a final order in a state court in an interlocutory appeal in this case where a question of federal law is raised.

2. As set out by respondents (R. Br. pp. 5-6), the Illinois court has held that no injunctive relief is available to petitioner until he has exhausted all internal union remedies. Petitioner agrees that a member of a labor union must follow union procedure, and that court action that is premature would not be proper. But in this case, respondents imply that by waiting for internal union appeals there is some effective remedy available to petitioner. This is misleading because the union's procedure and the Illinois Exhaustion Rule prevents any relief whatsoever.

Respondents point out (R. Br. p. 6) that the Illinois court has permitted petitioner to prosecute his suit on the merits, although the injunction was denied, and respondents implying that petitioner could find a remedy in that proceeding. This is also misleading, and it is anomalous. A hearing on the merits without the injunction is ineffective, see *Local 438* v. *Curry*, 1963, 371 U. S. 542 cited above, at pp. 549-550. And it is anomalous for the court to say petitioner has standing to sue on the merits, before internal procedure is exhausted, but that he cannot have injunctive relief only because he has not exhausted those internal union remedies. By the holding below the Illinois court has sanctioned union procedure that denies to a rank and file member the right to run for union office. This is the kind of union procedure, made up of illusory rights, that caused

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in the present case that remedy is even more illusory than the Illinois Exhaustion Rule. The Secretary of Labor (Supplement to this brief) has taken the position that he will not investigate the election where petitioner was removed from the ballot, and refused the right to run as a delegate to the union convention, but will only act after the delegates have performed their functions at that convention, a position that raises the old adage about the barn door and the horse.

Congress to adopt a "Bill of Rights'" in the Landrum-Griffin Act.

Petitioner asks this Court to grant review, to apply the provisions of the Landrum-Griffin Act so as to permit judicial relief where a union member is denied the right to run for office, and to hold that this relief is available in suits brought in state courts.

Respectfully submitted,

MARSHALL PATNER,
135 South La Salle Street,
Chicago, Illinois,
Attorney for Petitioner.

SUPPLEMENT.

U. S. DEPARTMENT OF LABOR
Office of the Secretary
Washington

Mar. 9, 1964

Mr. Marshall Patner,
Dixon, Todhunter, Knouff & Holmes,
The First National Bank Building,
Chicago, Illinois 60603.

DEAR MR. PATNER:

Reference is made to your letters of February 13 and 14, 1964, concerning the complaint of your client, Mr. John W. McGinness.

A review of Mr. McGinness' letter reveals that he was a candidate for the position of delegate to the National Convention of the Brotherhood of Railroad Trainmen to be held on September 28, 1964.

The provisions of Title IV of the Labor-Management Reporting and Disclosure Act (LMRDA) do not apply to the election by members of a labor organization of its delegates to national or international conventions except when an election of officers of the national or international labor organization is to be held at such a convention.

Inasmuch as the officers of the Brotherhood of Railroad Trainmen are to be elected at its September 1964 Convention, the requirements of Section 401(e), LMRDA, as to safeguards and procedures would have to be observed and any violations would be subject to the enforcement action provided in Section 402. However, it is the policy of the

Department not to conduct an investigation of a delegate election until the delegates have performed their function of voting for the officers.

In consequence of our position, the complaint of your client, Mr. McGinness, cannot be accepted until the election of the officers has occurred.

Yours sincerely,

W. WILLARD WIRTZ,
Secretary of Labor.